

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

FUTUREWISE, GOVERNORS POINT
DEVELOPMENT COMPANY, TRIPLE R.
RESIDENTIAL CONSTRUCTION, INC. AND
THE SAHLIN FAMILY, ERIC HIRST, LAURA
LEIGH BRAKKE, WENDY HARRIS AND
DAVID STALHEIM, AND CITY OF
BELLINGHAM,

Petitioners,

v.

WHATCOM COUNTY,

Respondent.

Case Nos. 11-2-0010c and 05-2-0013

CERTIFICATE OF APPEALABILITY

**Thurston County Superior Court
No. 13-2-00267-9**

I. REQUEST FOR CERTIFICATE OF APPEALABILITY

This matter is before the Board on the application for a Certificate of Appealability for direct review by the Washington State Court of Appeals Division II in *Eric Hirst, Laura Leigh Brakke, Wendy Harris, and David Stalheim v. Growth Management Hearings Board, Western Washington Region and Whatcom County*, Thurston County Superior Court Cause No. 13-2-00267-9.¹

II. PROCEDURAL BACKGROUND

On May 10, 2011, Whatcom County adopted Ordinance No. 2011-013 which amended the County Comprehensive Plan to address the Supreme Court's decision in *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723 (2009) holding that "the County must revise its comprehensive plan to conform to 1997 amendments to the GMA [Growth Management Act] that set out criteria for establishing limited areas of more intensive rural development

¹ Filed February 15, 2013.

1 and rural densities.”² Several Petitioners³ filed petitions before the Western Washington
2 Region of the Growth Management Hearings Board alleging that the County’s actions did
3 not comply with the GMA. The Board found the County had not complied with portions of
4 the GMA. In its Final Decision and Order and Order Following Remand on Issue of
5 LAMIRDs, the Board found the County’s “Comprehensive Plan amendments and
6 development regulations permit a population in the County rural areas far in excess of the
7 allocation elsewhere provided for in the County Comprehensive Plan, thereby creating Plan
8 inconsistency in violation of RCW 36.70A.070 (preamble) and RCW 36.70A.130(1).”⁴
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11 In August 2012, the County adopted Ordinance 2012-032 to address the Board’s FDO.⁵
12 Hirst, et al. and Futurewise again filed petitions with the Board taking issue with the
13 County’s compliance actions. On January 4, 2013, the Board found the County had made
14 significant progress in aligning its Comprehensive Plan’s Rural Element with the GMA, but
15 found the County still violated GMA requirements in specific respects.⁶ The Board
16 remanded these remaining matters to the County to take action to achieve compliance.
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18 On February 4, 2013, Hirst, et al. filed a Petition for Judicial Review of an Administrative
19 Hearing Decision as Authorized by RCW 36.70A.300(5) in Thurston County Superior Court
20 (Case No. 13-2-00267-9). The Petition challenges the Compliance Order as it addresses
21 the Comprehensive Plan inconsistency with respect to rural population allocation.
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25 ² *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 726 (2009).

26 ³ Hirst, Brakke, Stalheim, City of Bellingham, Futurewise, and Governors Point Development Company.

27 ⁴ *Futurewise/Governors Point Development Co., et al. v. Whatcom County*, GMHB, Western Washington
28 Region, Case Nos. 11-2-0010c and 05-2-0013, Final Decision and Order and Order Following Remand on
Issue of LAMIRDS (“FDO”) (January 9, 2012), at 121.

29 ⁵ County Compliance Report, filed August 28, 2012.

30 ⁶ *Futurewise/Governors Point Development Co., et al. v. Whatcom County*, GMHB, Western Washington
31 Region, Case Nos. 11-2-0010c and 05-2-0013, Compliance Order and Order Following Remand on Issue of
32 LAMIRDs (“Compliance Order”) (January 4, 2013) (finding noncompliance in failing to provide required
protection for Lake Whatcom water resources, allowing exemptions for Type I, II and III LAMIRDs, not
establishing logical outer boundaries for some LAMIRDs or internally consistent boundaries for some Rural
Neighborhoods, and creating an internal inconsistency in its plans and regulations regarding water
transmission lines).

1 Between February 1 and 4, 2013, several parties filed appeals of the Board's Compliance
2 Order in Skagit County Superior Court, Whatcom County Superior Court, and Thurston
3 County Superior Court on grounds unrelated to rural population allocation. On February 13,
4 2013, Whatcom County filed a motion with Thurston County Superior Court for a change in
5 venue for the sake of court efficiency. The County argues that all related petitions should
6 be consolidated in one court for consideration.⁷
7

8 On February 15, 2013 Hirst, et al. applied to the Board for a Certificate of Appealability.
9 Petitioners argue the Board's Compliance Order states that "[t]here is inconsistency
10 between the development capacity allowed in the County's rural areas and the population
11 projections in the comprehensive plan. This was the basis for noncompliance identified in
12 the FDO on Remand.⁸" And, yet the Board found the County complied with the GMA with
13 respect to the inconsistency between the Comprehensive Plan's population allocation and
14 its development capacity.⁹
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17 On February 22, 2013, Respondent Whatcom County filed a response to the Application for
18 Certificate of Appealability requesting the Board refrain from issuing the Certificate until after
19 the Court's ruling on a change of venue.
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21 On February 26, 2013 Petitioner Futurewise filed a concurrence in Hirst, et al.'s application
22 for Certificate of Appealability arguing a delay would be detrimental to the public interest,
23 that statewide and regional issues are raised, and that the court's decision will set a
24 precedent.
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27 **III. AUTHORITY AND ANALYSIS**

28 The Administrative Procedure Act, RCW 34.05.518, sets forth the criteria and procedures
29 for Certificates of Appealability. RCW 34.05.518(3) identifies the Growth Management
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31 ⁷ Respondent Whatcom County's Response to Application for Certificate of Appealability (February 22, 2013),
at 2 and 3.

32 ⁸ Compliance Order, at 27.

⁹ Application for Certificate of Appealability (February 15, 2013), at 3.

1 Hearings Board as an “environmental board,” and establishes the following criteria for a
2 certificate of appealability: (emphasis added)

3 (b) An environmental board may issue a certificate of appealability if it finds
4 that **delay in obtaining a final and prompt determination of the issues**
5 **would be detrimental to any party or the public interest** and **either**:

6 (i) Fundamental and urgent statewide or regional issues are raised; **or**

7
8 (ii) The proceeding is likely to have significant precedential value.

9 RCW 34.05.518(4) requires a board to state in its certificate of appealability “which criteria it
10 applied [and] explain how that criteria was met.” This Board reviews the request for
11 certification in light of each of these criteria.
12

13 **A. Detrimental Delay**

14 This is a threshold question as the Board may not issue a Certificate of Appealability unless
15 “delay in obtaining a final and prompt determination of the issues would be detrimental to
16 any party or the public interest.”¹⁰ This case involves establishing how the County will
17 accommodate future population growth in its rural areas. As Petitioners state in their
18 Application, there is nothing in the County’s Comprehensive Plan or development
19 regulations preventing the vesting of development rights to accommodate virtually all of the
20 County’s projected population in rural lands, establishing patterns of sprawl and detracting
21 from compact urban development. The GMA recognizes these interests.¹¹
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24 The County does not address the effects of delaying a court decision. Rather, it seeks one
25 venue for court review of appeals of unrelated aspects of the Compliance Order.
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27 The Board finds the interests of the Petitioners are harmed by delay because of the
28 likelihood of vesting development projects that accommodate all of the County’s allocated
29 population growth before a court can determine whether there must be limits to
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32 ¹⁰ RCW 34.05.518(3)(b).

¹¹ Application for Certificate of Appealability (February 15, 2013), at 4.

1 development capacity in the County's rural element. The Board finds that the public interest
2 is best served in deciding this particular matter on an expedited basis. The GMA expresses
3 a state interest in focusing growth in urban areas for efficient service provision and
4 discouraging sprawl. Delay in resolving the question with respect to Whatcom County's
5 rural plans may result in irreversible rural sprawl.
6

7 **Conclusion:** For the reasons stated above, the Board finds delay in this matter would be
8 detrimental to the interests of Petitioners and to the public interest.
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10 **B. Fundamental and Urgent Statewide or Regional Issues Raised**

11 One of the underlying issues in the Board's Compliance Order is whether the County's rural
12 lands designations and the densities within those lands over-accommodate projected
13 population growth. The Board's Compliance Order described the situation as such: "As a
14 measure to contain and control rural development, the County adopted Policy 2DD-1
15 requiring an annual review of population growth in rural areas and, if there are
16 discrepancies between projected and actual population growth, the County is required to
17 adjust their plan and development regulations."¹² On the other hand, the Board described
18 Petitioner's position as: "Petitioners argue that Policy 2DD-1 does not meet RCW
19 36.70A.070 or RCW 36.70A.130 to resolve plan inconsistencies. Petitioners restate the
20 FDO findings that the County's comprehensive plan amendments and development
21 regulations:
22
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24 . . . permit a population in the County rural areas far in excess of the
25 allocation elsewhere provided for in the County Comprehensive Plan,
26 thereby creating Plan inconsistency in violation of RCW 36.70A.070
27 (preamble) and RCW 36.70A.130(1).¹³ (emphasis added)

28 In its discussion and analysis the Board stated:

29 "The GMA is not explicit with respect to *rural* population, and the parties
30 argue the GMA says nothing about rural allocations. This creates a dilemma
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32 ¹² Compliance Order, at 23.

¹³ FDO at 118-121.

1 and a real likelihood of rural areas being over-zoned and creating sprawl.”¹⁴

2 While the Board appreciated the detailed population analysis by the Petitioners, it found
3 RCW 36.70A.215(7) only requires population calculations and its application to rural lands
4 in “buildable lands” counties.¹⁵ Whatcom County is not designated a buildable land county,
5 thus the Board ruled the County was in compliance with GMA. Petitioners assert this case
6 raises the fundamental question of consistency between accurate population projections
7 and development capacity to accommodate new residents¹⁶. Further, the population
8 projections determine infrastructure needs that must be accurately and consistently
9 reflected in a comprehensive land use plan including the capital facilities plan. The Board
10 sees a fundamental and urgent statewide or regional question to be resolved.
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12

13 **Conclusion:** For the reason stated above, the Board finds this matter involves an issue of
14 fundamental regional importance.
15

16 **C. Significant Precedential Value**

17 RCW 34.05.518 (3)(b) requires the Board to find that the matter *either* presents a
18 fundamental regional issue *or* is likely to have significant precedential value. Having found
19 that the issue presented is of fundamental regional importance, the Board need not address
20 the precedential value of this matter. However, pursuant to RCW 34.05.518 (4), the Board
21 responds to an assertion of the applicants.
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24 Futurewise points out, and the Board acknowledges, that appellate rulings on GMA
25 questions provide precedential guidance to other local governments. The question of
26 population allocation to rural lands has not been decided by the Courts.
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28 ¹⁴ *Citing, Brent D. Lloyd, Accommodating Growth or Enabling Sprawl? The Role of Population Growth*
29 *Projections in Comprehensive Planning Under the Washington State Growth Management Act*, 36 Gonz. L.Rev.
30 73, at 141-142.

31 ¹⁵ Compliance Order, at 26. See also RCW 36.70A.215(1)(a).

32 ¹⁶ See Lloyd, 36 Gonz L.Rev. at 150: “By mentioning population growth projections only in connection with its urban planning requirements, does the Act mean to exclude population growth projections from any mandatory role in rural planning decisions? ...[T]he letter and spirit of the GMA require a negative answer to that question.”

1 As Futurewise contends, resolution by the appellate courts of the question of rural
2 population allocation is likely to have significant precedential value as it affects county and
3 city decisions on 2016 comprehensive plan and development regulation updates. The
4 Board concurs.
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7 **Conclusion:** For the reason stated above, the Board finds judicial determination of this
8 matter is likely to have significant precedential value.
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10 IV. ORDER

11 Having reviewed the application for Certificate of Appealability, the relevant provisions of the
12 Administrative Procedures Act, in particular RCW 34.05.518(3)(b), and the facts of this
13 matter, the Board finds that delay in obtaining a final and prompt determination of the issues
14 will be detrimental to Petitioners and to the public interest. The Board further finds that a
15 fundamental issue of regional importance is raised and that a judicial determination is likely
16 to have significant precedential value.
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18 Having found the criteria of RCW 34.05.518(3) are satisfied, the Board issues a Certificate
19 of Appealability for direct review in Thurston County Superior Court Case No.13-2-00267-9.
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21 Entered this 15th day of March, 2013.
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23 _____
24 Nina Carter, Board Member

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26 Margaret Pageler, Board Member

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28 Raymond Paoletta, Board Member
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